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In The

Supreme Court of the United States

October Term, 1987

SIERRA CLUB,

Petitioner,

vs.

SHELL OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jose A. Berlanga
Burt Ballanfant*
Shell Oil Company
Legal Department
4708 One Shell Plaza
P. O. Box 2463
Houston, Texas 77001
(713) 241-2233

Sam A. LeBlanc, III
Paul O. Dicharry
Adams & Reese
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

Attorneys for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

Whether the Court below was correct in holding that a federal district court may dismiss a case on the merits if the plaintiff fails to raise a fact issue about whether a defendant was "in violation" of its permit when the action was filed as that term is defined under the Clean Water Act?

Whether the plaintiff, Sierra Club, had standing to bring this action?

Whether the notice provided by the Sierra Club pursuant to 33 U.S.C. § 1365 was adequate?

Whether 33 U.S.C. § 1365 is unconstitutional because it confers power of the executive branch of government upon citizens?

PARTIES

Petitioner is Sierra Club, a non-profit corporation organized under the laws of the State of California.

Respondent, Shell Oil Company, is a Delaware corporation with its principal place of business in Houston, Texas. All of Shell Oil Company's common stock is owned by SPNV Holdings, Inc., a Delaware corporation, whose stock is owned by Shell Petroleum N.V., a Netherlands company. The voting shares of Shell Petroleum N.V. are held 60 percent by Royal Dutch Petroleum Company and 40 percent by Shell Transport and Trading Company, a Public Limited Company in London, U.K. Shell Oil Company also has an interest in a number of companies. The following companies are affiliated with Shell Oil Company or one of its affiliates, but are not wholly owned subsidiaries:

Pecten Middle East Services Company
Gravcap, Inc.
Heat Transfer Research, Inc.
Inland Corporation
Loop, Inc.
Lucky Chance Mining Company, Inc.
Mesbic Financial Corporation of Houston
Oil Companies Institute for Marine Pollution Compensation Limited
Oil Insurance Limited
Seadock, Inc.
East Texas Salt Water Disposal Company
Grande Ecallie Land Company, Inc.
Thums Long Beach Company
Van Salt Water Disposal Company
WIDC (Wyoming Industrial Development Corporation)
Cortez Capital Corporation

George Newman & Company
Oil Companies Institute for Marine Pollution Compensation Limited
Butte Pipe Line Company
Dixie Pipeline Company
Explorer Pipeline Company
Locap, Inc.
Olympic Pipe Line Company
Plantation Pipe Line Company
West Shore Pipe Line Company
Wolverine Pipe Line Company
Morrison Molded Fiber Glass Company
Xerkon Inc.
Huntsman Chemical Corporation

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BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent Shell Oil Company respectfully prays that this court deny the Sierra Club's petition for a writ of certiorari to review the judgment and opinion of the United States District Court of Appeals for the Fifth Circuit entered in *Sierra Club v. Shell Oil Company,* 817 F.2d 1169 (5th Cir. 1987) on May 29, 1987. While this court has granted a writ of certiorari in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation and Natural Resources Defense Council, Inc.,* 791 F.2d 304 (4th Cir. 1986), *cert granted* — US —, 107 S. Ct. 872 (U.S. January 12, 1987), (hereinafter *Gwaltney*), (No. 86-473) this case turns upon its own facts and is consistent with *Pawtuxet Cove Marine, Inc. v. Ciba-Geigy Corporation,* 807 F.2d 1089 (1st Cir. 1986), petition for cert filed (U.S. March 17, 1987) (No. 86-1562) (hereinafter *Pawtuxet*). Respondent respectfully submits that the decision of the Fourth Circuit in *Gwaltney* is incorrect.

STATEMENT OF THE CASE

The Sierra Club's presentation of Shell Oil Company's ("Shell") compliance record according to its Clean Water Act permit (National Pollutant Discharge Elimination System Permit, hereinafter NPDES) at its petroleum refinery in Norco, Louisiana, discloses the petitioner's failure to address the central factual determination made by the trial court, i.e., the plaintiff's failure to raise a fact issue concerning whether or not Shell was in violation of the Act at the time that the Complaint was filed. Shell's factual presentation of the case was uncontradicted in spite of the opportunity of the plaintiff to conduct extensive discovery for more than a year. The uncontradicted factual record before the trial court revealed the following permit and compliance history for Shell Oil Company's oil refinery in Norco, Louisiana.

Shell's Norco Refinery was issued its first NPDES permit under 33 U.S.C. § 1342 of the Clean Water Act in July, 1977. Although that permit expired under its terms on October 30, 1979, the permit remained in effect pursuant to the Administrative Procedures Act, 5 U.S.C. § 558(c), and 40 C.F.R. § 122.6 during pendency of Shell's application for a new permit. That second permit was issued on May 16, 1980; the third and current permit was issued on August 15, 1983.

On or about January 20, 1984, Sierra Club attorneys sent a letter ostensibly under 33 U.S.C. 1365(b) to notify Shell of the Sierra Club's intent to file suit to enforce the terms of Shell's NPDES permit at the Norco Refinery. Sierra Club filed its Complaint on July 24, 1984 alleging violations by Shell of the Clean Water Act, 33 U.S.C.

§ 1311(a). Specifically, the Sierra Club alleged 120 violations of Shell's NPDES permit at the Norco Refinery between January, 1980 and March, 1984. Sierra Club also alleged that violations had occurred subsequent to March, 1984. At the time the suit was filed Sierra Club had no evidence that Shell had violated its permit in any way after March 7, 1984.

Respondent will summarize the record reviewed by the appellate court with respect to Shell's compliance history on two (2) of the eight (8) parameters at issue in the litigation. A detailed discussion of these two (2) parameters is important to highlight the appellate court's thorough review of the record in order to determine whether a factual issue had been created by the Sierra Club's showing before the district court.

TOTAL SUSPENDED SOLIDS (TSS)

Since 1976 each of Shell's permits has contained dual limitations which placed a Daily Maximum and Daily Average limitation on the amount of pollutants that could be discharged from Shell's refinery. The TSS limitations in effect under Shell's second permit were more restrictive than the limitations of the first permit. While the second permit was in effect a total of forty-eight (48) exceedences were reported to the Environmental Protection Agency (hereinafter EPA). On August 15, 1983, the EPA issued Shell's third permit. Shell's third permit, however, contained higher limitations for TSS. After the issuance of the third permit, there was only one TSS Daily Maximum exceedence. That exceedence occurred on December 29, 1983 in the midst of the coldest weather experienced in

the Norco area in over twenty (20) years. No other TSS exceedences occurred between December 29, 1983 and February 7, 1985.[1] Any problem that may have existed with respect to the TSS limits was solved by the increased limitations granted by the EPA. At the time the complaint was filed, there was no continuing or recurring violation of the TSS parameter at Shell's Norco refinery.

CHROMIUM, HEXAVALENT AND TOTAL

Shell used chromates for the purpose of corrosion control in its water cooling towers at its Norco refinery. Between the approximate dates of January, 1980 and July, 1984, Shell's records submitted to the EPA reflect that there were a total of eighteen (18) exceedences of hexavalent chromium. In addition, during that same time period, there were a total of two (2) Daily Maximum exceedences of total chromium. The last chromate exceedance, a hexavalent chromium exceedence, occurred on March 7, 1984.

Sierra Club lawyers were advised in March, 1984 by William L. Caughman, Jr., Environmental Conservation Manager for the Norco refinery, that Shell was contemplating the elimination of chromates for corrosion control at the Norco refinery. Mr. Caughman recommended in

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1. The district court's ruling on Shell's Motion for Summary Judgment was based on various supporting materials. The supporting materials included three (3) affidavits from William L. Caughman, Jr., excerpts of the depositions of William L. Caughman, Jr., excerpts from R. E. Deister's deposition, a summary of the reported exceedences and the Stipulation of the Sierra Club. The material was presented in support of Shell's factual presentation of its case and was uncontroverted.

May, 1984, that a non-chromate corrosion control system be implemented. In June, 11984, Mr. Caughman's recommendation was accepted. By January, 1985, the Norco refinery was utilizing a non-chromate corrosion control system. Shell's use of a non-chromate corrosion control system at the refinery eliminated the likelihood that Shell would ever experience a recurring problem with the chromate parameters.

The Sierra Club made no further inquiry regarding chromates prior to filing its action in July, 1984. At the time Sierra Club filed its Complaint, it had no evidence that there had been any exceedences occurring between March 8, 1984 and July 21, 1984, the date the Complaint was filed. See App. at App. 1.

OTHER PARAMETERS

The remainder of Shell's compliance record merely reveals a variety of multiple, sporadic and past exceedences of different parameters during an extended time period. Of the five reported phenol exceedences, four occurred during a pipe rupture in 1981. The four TOC (Total Organic Carbon) exceedences reported in 1982 occurred at a separate outfall from the remainder of the exceedences. The evidence and testimony presented by Shell demonstrated that the Shell laboratory responsible for making the tests experienced a short period of time during which the elevated readings were attributed by the laboratory manager, R. E. Deister, to errors made by persons in charge of preparing the sample bottles used to conduct the tests. The records submitted by Shell to the EPA

demonstrated that there were a total of eleven (11) ph exceedences since January, 1980. However, the last ph exceedence prior to the filing of the Complaint occurred on June 23, 1982. Shell's records also indicated a total of 15 BOD (Biochemical Oxygen Demand) exceedences. Of that total, 7 occurred during unusually severe weather conditions in the Norco area in December, 1983 and January, 1984. The last BOD exceedence prior to the filing of the Complaint, occurred on January 16, 1984. There were no other exceedences of this parameter for more than six months prior to the date the plaintiff filed its Complaint.

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REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW WAS DECIDED ON THE SPECIFIC RECORD BEFORE THE APPELLATE COURT CONSISTENT WITH FIFTH AND FIRST CIRCUIT LAW.

The Respondents' Opposition to the Petition for Certiorari addresses the propriety of the Appellate Court's ruling on the basis of the factual records and current Fifth and First Circuit law and those arguments will not be repeated here. The court is respectfully referred to the consolidated opposition for a recitation of all the applicable arguments. Respondent points out, however, that under the standards articulated by the Fifth Circuit in *Hamker v. Diamond Shamrock Chemical Corp.*, 756 F.2d 392 (5th Cir. 1985) and by the First Circuit in *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986), Petition for Cert. filed (U.S. March 17, 1987) (No. 86-

1562), the uncontradicted factual record before the district and appellate courts demonstrated that Shell was not in violation on or near the date the Complaint was filed. Petitioner simply failed to raise a genuine issue of material fact and the trial court granted a summary judgment for Shell. The Fifth Circuit found no error with the trial court's decision, and affirmed.

II. THE RESPONDENT LACKS STANDING TO BRING THIS ACTION

Respondent contends that the Petitioner does not have standing to bring this action. The arguments on standing are addressed in the consolidated opposition and will not be repeated here. The Court is respectfully referred to the consolidated brief for a full recitation of the applicable arguments.

III. THE RESPONDENT FAILED TO PROVIDE ADEQUATE NOTICE

Sierra Club's notice letter of January, 1984, cited forty-seven (47) alleged violations of the Act. See App. at App. 6. Respondent contends that the notice is deficient because it makes reference to alleged violations of expired permits and the notice cited twenty-five (25) alleged TSS violations of a limit which was subsequently increased. The notice letter on its face did not make any reference at all to a non-compliance under Shell's permit in effect at the time that the Complaint was filed. Only alleged violations of expired permits were cited.

As stated in the Supreme Court's decision in *Middlesex County Sewerage District v. National Sea Clammers Assn.*, 433 U.S. 1 (1981) notice is mandatory. Notice of

alleged violations relating to expired permits or limitations which are no longer applicable cannot support jurisdiction. The language which prohibits the filing of an action without giving proper notice has been held to be jurisdictional in several environmental contexts. *City of Highland Park v. Train,* 519 F.2d 681 (7th Cir.), *cert. denied,* 424 U.S. 927 (1975) (Clean Air Act); *Massachusetts v. United States Veterans Administration,* 541 F.2d 119 (1st Cir. 1976) (Clean Water Act); *Reeger v. Mill Service, Inc.,* 593 F. Supp. 360 (W.D. Pa. 1984) (Clean Air and Clean Water Acts). The purpose of the notice provision is to trigger governmental action thereby alleviating the need for judicial action. *Highland Park, supra* at 691. Recourse to the court is appropriate only when the administrative action taken is inadequate. *Massachusetts, supra* at 121.

The last item referenced by the Sierra Club in its notice letter is dated April, 1983. See App. at App. 7. On its face such a notice cannot be sufficient to "trigger" governmental action particularly in view of the reference within that notice to outdated limitations. The only concern which can be gleaned from the Sierra Club's notice is that the plaintiff was concerned about a problem related to an expired permit. Plaintiff's listing of more recent alleged violations in an appendix to its complaint is of no consequence since the Act requires notice before an action is filed. As stipulated by the Sierra Club at the time the complaint was filed, the Sierra Club had no factual evidence of any violations which occurred between March 8, 1984 and July 21, 1984. For the above reasons, the notice letter of January, 1984, was insufficient and failed to comply with the requirements of Section 1365(b) of the Act.

IV. SECTION 1365 OF THE ACT IS UNCONSTITUTIONAL IN THAT IT GRANTS PRIVATE CITIZENS THE AUTHORITY TO EXERCISE EXECUTIVE FUNCTIONS

A. Separation of Powers

The principle of separation of powers between the various branches of government is embedded in the very structure of the Constitution. The Constitution divides the powers of the Federal Government into three categories, Legislative, Executive and Judicial. *I.N.S. v. Chadha,* 462 U.S. 979, 951 (1983). As noted by the Supreme Court, the reason for dividing the powers of government was to "diffuse power the better to secure liberty." *Bowsher v. Synar,* 106 S. Ct. 3181 (1986).

B. Executive Function

The Constitution vests the Executive Power of government in the President. U.S. Const. Art. II, § 1, cl. 1. Enforcement of the laws is an executive function.

> Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. *Springer v. Phillippine Islands,* 277 U.S. 189, 202 (1928).

The Supreme Court in *Buckley v. Valeo,* 424 U.S. 1 (1976) struck down provisions of the Federal Election Campaign Act providing primary responsibility for conducting civil litigation in U.S. District Courts to an eight member Federal Election Commission composed of members appointed by the President as well as members appointed by the Senate and the House of Representatives. The Supreme

Court based its decision in *Buckley* on the doctrine of separation of powers between the branches of government and the constitutional requirement that only officers of the United States appointed pursuant to the Constitution may engage in the enforcement of the public law. *Buckley, supra.*, pp 118-143.

The authority of the Executive Branch to seek forfeiture of property to the government highlights the unique position of the executive in such matters. *In Re Confiscation Cases,* 74 U.S. 454 (1869), the Supreme Court considered whether an informer had a vested interest in a shop seized for violation of laws prohibiting the use of property to aid, abet or promote insurrection. At the time, the Act of August 6, 1861, provided that an informer was entitled to a moiety from the proceeds of a forfeiture. The court decided that the informer had no vested interest in the subject matter of the action and upheld the lower courts decision to permit dismissal of the libel in one instance and the reversal of a decree in favor of the United States at the request of the Attorney General in another. The total and complete autonomy of the executive in these matters has been clearly established.

> Whether tested, therefore, by the requirements of the Judiciary Act, or by the usage of the government, or by the decisions of this court, it is clear that all such suits, so far as the interests of the United States are concerned, are subject to the direction and within the control of the Attorney-General. *Confiscation Cases,* at 458-459.

The penalty extracted by the government for violation of environmental provisions is no different than the penalty

of forfeiture imposed for violation of numerous laws established by Congress.[2]

The autonomy of the Executive Branch in matters related to the criminal enforcement of laws is likewise undisputed. In *United States v. Cox,* 342 F.2d 167, 171 (5th Cir. 1965) *cert. denied,* 381 U.S. 935 (1965) the Fifth Circuit Court of Appeals held in an *en banc* decision that a United States Attorney was justified in refusing an order of a district court to prepare and sign an indictment. In the *Cox* case the grand jury had made it clear that they wanted to bring indictments against certain persons. The U.S. Attorney refused and could not be ordered by the court to do so. The importance of this case is that it underscores the exclusive authority of the Executive Branch in the enforcement of the law to the exclusion of private citizens even if clothed with the mantle of authority granted to a grand jury. In matters relating to the enforcement of the law, the holdings in *Cox* and in *Confiscation Cases* support the proposition that the Executive Branch has the right to enforce civil laws to the exclusion of any right by private citizens to collect penalties.

C. Structure of the Clean Water Act

The Clean Water Act reflects in part that Congress worked within the Constitutional requirement providing that the laws of the United States be enforced by Officers of the United States in accordance with U.S. Const. Art. II, § 2, cl. 2. The Act grants to the administrator of the

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2. The CWA was amended on February 4, 1987, to provide for penalties in the amount of $25,000 per day for each violation.

EPA the authority to administer the Act. 33 U.S.C. § 1251(d). The Administrator, the head of the Agency, is appointed by the President with the advice and consent of the Senate. Reorg. Plan No. 3 of 1970, 35 C.F.R. 15623 reprinted in 5 U.S.C.A. App. at 81 (West Supp. 1986). Under the Act the administrator has broad powers to enforce the provisions of the law by administrative or judicial action. 33 U.S.C. § 1319. Under § 1319(d), the administrator may seek civil penalties in the amount of $10,000 per day for violation of permit conditions.[3] The Attorney General of the United States shall at the request of the administrator appear and represent the United States in civil and criminal actions filed under the Act. 33 U.S.C. § 1367. Officers or employees of the EPA are also authorized to appear and represent the United States under certain conditions. *Id.* The Attorney General is the head of the Department of Justice appointed by the President with

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3. Respondent acknowledges the existence of *qui tam* actions. Several statutes, such as the False Claims Act, 31 U.S.C. § 3729, as amended provide private citizens with a percentage of a recovery of any action for actions brought against persons who defraud the government. No court has yet addressed the constitutionality of *qui tam* actions in the context of a challenge based on the separation of powers doctrine. Significant differences exit between the *qui tam* statutes and citizen suits. Private citizens do not obtain an interest in the recovery, i.e., the penalty. The very essence of standing in environmental cases is predicated on an individualized injury and not based on securing a benefit for the public at large. Additionally, the need to provide incentives to private individuals is not present. Unlike the cases involving fraud, there is no need to encourage informers. All information necessary to file an action is provided to the government and available to the public. *Qui tam* actions do not support the constitutionality of citizen suits simply because the rationale for their existence is substantially different.

the advice and consent of the Senate. 5 U.S.C. § 503. The Department of Justice is an executive department of the government. 5 U.S.C. § 502. While the foregoing demonstrates the constitutional structure established by Congress to enforce the provisions of the Clean Water Act, Congress exceeded the constitutionally permissible limits when it chose to give private citizens the right to exercise an executive function: i.e., the right to collect a penalty presumably destined for the U.S. Treasury.[4]

It is important to note that many environmental statutes provide for dual enforcement by federal or state governments and for a private cause of action by citizens. The Clean Water Act was enacted in 1970[5] and has served as a model for many environmental statutes.[6] The difference between the Clean Air Act and the Clean Water Act is that private citizens may seek monetary penalties in addition to injunctive relief. This difference is significant because the Clean Water Act does not directly provide that penalties collected are payable to the United States Treasury.[7] Private citizens do not fall under the provisions applicable to custodians of public money who may be removed from office for failure to promptly deposit public money in the

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4. The Act on its face does not require a citizen to deposit penalties in the Treasury. However, the Supreme Court suggested in a footnote that the penalties collected by private citizens are payable to the government. *Middlesex County Sewerage Authority v. National Sea Clammers*, 453 U.S. 1, 14 & n.25 (1981).

5. 42 U.S.C. §§ 7401-7642.

6. See Generally: Miller, *Private Enforcement of Federal Pollution Central Laws* (pts. 1-3). 13 ELR 10309 (Oct. 1983), 14 ELR 10063 (Feb. 1984), 14 ELR 10407 (Nov. 1984).

7. See footnote 4.

U.S. Treasury. 33 U.S.C. § 3302. More importantly, private citizens have not been appointed by the President to enforce environmental laws as required by the Constitution. U.S. Const. Art. II, § 2, cl. 2. The lack of authority and oversight over the activities of persons who exercise executive functions means that the Parsident cannot effectively meet his obligation to "take care that the Laws be faithfully executed." U.S. Const. art. II, § 3.[8]

By enacting a statutory scheme providing aggrieved citizens the right to sue for relief in connection with the enforcement of environmental laws, Congress brought the separation of powers and standing doctrines into consideration.[9] In so doing, Congress authorized private citizens to question and circumvent the Executive Branch's initiative and prosecutiorial discretion in certain areas. 33 U.S.C. § 1365(a)(1)(2). The concept that highlights the interplay between the separation of powers doctrine and congressional mandates for environmental protection is standing. Indeed, by permitting a broader interpretation of the constitutional standing requirements, individ-

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8. The problem is illustrated by a review conducted of settlements reached in 1983 involving citizen suits which revealed that in 90% of the cases environmental organizations and not the federal government received monetary payments. See Generally: Lewis, *Environmentalist Authority to Sue Industry is Unconstitutional Under Separation of Powers Doctrine,* 16 ELR 10101 (Apr. 1986). In February, 1987, Congress amended the Act to provide that consent decrees must be submitted to the Attorney General and the Administrator of the EPA. 33 U.S.C. § 1365(c)(3). The stated purpose of the provision is to protect the interests of the United States.

9. See Generally: Antonin Scalia, *The Doctrine of Standing is an Essential Element of the Separation of Powers,* 17 Suffolk U.L. Rev. 881 (1983).

uals can now bring before the courts a number of issues previously considered to be committed to the discretion of other branches of government.[10] While the purpose of the standing requirement has often been stated that it is "to assure that concrete adverseness which sharpens a presentation of issues," standing nevertheless requires that an individual have an injury in fact.[11] The existence of a personal stake in the litigation is the essence of standing. *Baker v. Carr*, 369 U.S. 186 (1962). It is the ability to particularize an injury that serves as a means to insure that policy decisions by the executive branch of government are subject to judicial review only when it is necessary to address a direct injury to an individual. Permitting private citizens to collect monetary penalties merely encourages interference with the prosecuturial discretion granted to an executive Branch of government and violates the delicate governmental balance sought to be established by the framers of the Constitution.

D. The Citizens Authority To Sue For Penalties Is Unconstitutional

In light of the Supreme Court's recently reaffirmed concerns over the need to maintain a clear separation of powers between the branches of government, this Court must concern itself with the question of who may engage in the executive function of collecting money for the government. *Synar, supra.; Chadha, supra.* Under the authorities cited in *Buckley, supra,* executive functions may be exercised only by officers of the United States subject

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10. *Id.* pp. 885-890.

11. *Id.* pp. 890-894.

to appointment and control of the President. Delegation of executive functions to private citizens by Congress is an unconstitutional act directly contrary to the Appointments Clause of the Constitution.[12]

The Constitution mandates those who enforce the laws of the United States be appointed by the President and subject to his direction and control.

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. *Myers v. United States*, 272 U.S. 52, 117 (1926).

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12. Two District Courts have considered a similar constitutional argument in the context of the Clean Water Act and has ruled against it. *Student Public Research Group of New Jersey, Inc. v. Monsanto Company*, 600 F. Supp. 1474 (D. N.J. 1985). The District Court in *SPIRG*, relied on *Davis v. Passman*, 442 U.S. 228, 241 (1979) to hold that Congress may vest enforcement power in whomever it pleases even if it acts unwisely. *Davis* held that an individual had an implied cause of action for damages under the Fifth Amendment based on her termination from employment as a staff member to a congressman for sex discrimination. *Davis* does not, however, stand for the proposition that Congress may authorize private citizens to perform the functions granted to the President by the Constitution. In *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 652 F. Supp. 620 (D. Md. 1987) the Court relied on the *Monsanto* case to approve the use of citizen suits and also reasoned that the separation of powers argument was not appropriate because the Legislative Branch did not retain Executive power for itself, but merely granted it to private individuals.

As stated by the Court in *Myers,* the President must appoint those who enforce the law as part of his constitutional duty to ensure the laws are adequately enforced.

> Our conclusion on the merits, sustained by the arguments before stated, is that article 2 grants to the President the executive power of the government—i.e., the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed . . .'' *Id.,* at pp. 163-164.

Congress may not avoid the Constitutional limitations of the Appointments Clause merely because it may be promoting a socially beneficial result. The principle of separation of powers embodied in the Constitution must be observed to insure the proper balance of power between the various branches of government including well intentioned but misguided attempts by Congress to relinquish the law enforcement function of the executive to private citizens. Therefore, this court must find that 33 U.S.C. § 1365 of the Clean Water Act is unconstitutional to the extent it seeks to delegate the exclusive authority of the executive branch to seek imposition of penalties for violation of environmental laws.

CONCLUSION

The writ of certiorari should not be granted in this case. Respondent submits that the decision by the Fifth Circuit in this case was correct and consistent with the First Circuit in *Pawtuxet.* Respondent submits that the Fourth Circuit's decision in *Gwaltney* is incorrect. Additionally, the decision of the Fifth Circuit may be upheld

given the Petitioner's lack of standing, its failure to give adequate notice, and the unconstitutionality of the citizen suit provision of the Clean Water Act. For the above reasons, Petitioner's writ of certiorari should not be granted.

Respectfully submitted,

JOSE A. BERLANGA
BURT BALLANFANT*
Shell Oil Company
Legal Department
4708 One Shell Plaza
P. O. Box 2463
Houston, Texas 77001
(713) 241-2233

SAM A. LEBLANC, III
PAUL O. DICHARRY
ADAMS & REESE
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

Attorneys for Respondent

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
AT NEW ORLEANS

SIERRA CLUB,

Plaintiff,

v.

SHELL OIL COMPANY,

Defendant.

Civil Action No. 84-3583

Sect. J MAG 2

STIPULATION

Plaintiff Sierra Club and Defendant Shell Oil Company ("Shell"), through their respective undersigned counsel, hereby agree to the following stipulated facts which shall be binding upon both parties and their representatives for the purposes of this action. It is specifically agreed by the parties that this stipulation is in lieu of the depositions of Sierra Club personnel and agents noticed by Shell on July 15, 1985, and scheduled pursuant to Magistrate Wynne's Minute Entry of July 26, 1985. The parties hereby stipulate as follows:

1. Shell prepares Discharge Monitoring Reports ("DMRs") and Non-Compliance Reports ("NCRs") and submits them, as required by federal regulation according to the terms of its NPDES permit, to the United States Environmental Protection Agency ("EPA").

2. In the fall of 1983, the National Resources Defense Council ("NRDC"), as representatives of the Sierra Club, examined and evaluated EPA NPDES discharge permit compliance files in several states, including Louisiana. The

NRDC reviewed information from the files of the EPA and the State of Louisiana, including DMRs, NCRs, two Notices of Deficiency dated February 21, 1979 and May 6, 1981, and a letter from Shell to EPA dated December 13, 1982, responding to deficiencies noted by EPA on November 29-30, 1982, a 1980 and a 1981 NPDES permit application, NPDES permits dated July 1977, May 1980 and August 1983, correspondence between Shell and EPA, and Louisiana state compliance and inspection reports. On the basis of the above review, the NRDC determined that Shell Oil at Norco, Louisiana, was a company with a pattern of permit non-compliance and that no diligent prosecution had been made by Federal or State authorities. The information collected by Sierra Club's representatives concerning Shell Oil's Norco, Louisiana, facility was forwarded to Sierra Club's counsel, the Center for Law in the Public Interest, in or around October of 1983. Shell does not concede the characterization of its permit history.

3. In or around December 1983 or January 1984, the Sierra Club Executive and Conservation Administration Committees in San Francisco, California, in consultation with the Sierra Club Legal Defense Fund, determined that Shell Oil, Norco, Louisiana should be notified of the Sierra Club's intent to file suit under the Clean Water Act to enforce the terms of Shell's NPDES permit, and authorized its counsel, the Center for Law in the Public Interest, to do so.

4. At this time, the Executive Committee of the Sierra Club was composed of Denny Shaffer, Michelle Perrault, Sandy Tepfer, Phil Hocker and Marty J. Fluharty. The Conservation Administration Committee of the Sierra Club was composed of Michael McCloskey, Phillip Berry and

Denny Shaffer. Mr. McClosky is the only member of either Committee employed by the Sierra Club, and at the time of the review discussed herein, served as its Executive Director.

5. On or about January 20, 1984, the Center for Law in the Public Interest sent a letter to representatives of Shell to notify Shell of its intent to file suit under 33 U.S.C. § 1365(b) to enforce the term of Shell's NPDES permit at the Norco, Louisiana refinery. This stipulation does not waive any objections Shell may have to the adequacy of such notice.

6. The Sierra Club's decision to send the letter described in paragraph 5 above was based on a review and analysis by the NRDC and Sierra Club's counsel in consultation with the Sierra Club Legal Defense Fund described in paragraph 3 above.

7. In or about April 1984, the Center for Law in the Public Interest made an FOIA request for all DMRs and NCRs filed by Shell with EPA since April 1983. In May 1984, the Center for Law in the Public Interest obtained DMRs covering the period of time from April 1983 to February 1984, and NCRs covering the period of time from April 1983 to March 1984. No additional requests for DMRs and NCRs were made by Sierra Club or its counsel to the EPA until after the filing of the lawsuit.

8. On or about March 13, 1984, representatives of the Center for Law in the Public Interest met with William Caughman, manager of the Environmental Conservation Department, Shell-Norco refinery, and Shell employees Charles Bland and Cynthia Graham, for the purpose of discussing the permit exceedances reflected in the DMRs and

the purported justifications therefor reflected in the NCRs.

9. As a result of this meeting, Sierra Club requested that they be sent the most recent DMRs and NCRs. On April 12, 1984, Shell sent to Sierra Club DMRs and NCRs from April 1983 through February 1984 and a December 1983 Bioassay report.

10. Prior to the filing of this action, the investigation and inquiry into the Shell-Norco permit exceedances made by the Sierra Club's representatives and its counsel was composed of the review of the records described in paragraphs 1, 2, 7 and 9 hereof and the meeting described in paragraph 8 hereof.

11. Prior to the filing of the Complaint, the information and documents described in paragraphs 1, 2, 7, 8 and 9 were reviewed and analyzed by Sierra Club's counsel. At the time the Complaint was filed, neither the Sierra Club nor its counsel had any factual evidence of any violation of Shell's NPDES Permit (LA0003522) other than the information reflected in the DMRs, NCRs and Notices of Deficiency described in paragraphs 1, 2, 7 and 9 hereof.

12. At the time the complaint was filed, the Sierra Club had no factual evidence of any violation which occurred between March 8, 1984 and July 21, 1984, other than as stated in paragraphs 1, 2, 7, 8 and 9.

13. At the date of these stipulations, the Sierra Club has no evidence of any violation occurring between the dates of March 8, 1984 and July 21, 1984.

Respectfully Submitted,

/s/ Susan B. Bovee
Burton H. Finkelstein
Susan B. Bovee
FINKELSTEIN, THOMPSON, LEVENSON & LEWIS
2828 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20007
(202) 337-8000

/s/ Katherine P. Ransel
ADVOCATES FOR THE PUBLIC INTEREST
1575 Eye Street, N.W.
Suite 650
Washington, D.C. 20005-1105
(202) 371-0199

/s/ Michael Osborne
OSBORNE, McCOMISKY & RICHARDSON-HARP
3420 Prytania Street
New Orleans, LA 70115
(504) 891-4418

Attorneys for Plaintiff Sierra Club

/s/ Jose A. Berlanga
SHELL OIL COMPANY
4708 One Shell Plaza
Houston, TX 70001
(713) 241-2233

/s/ Paul O. Dicharry
Sam A. LeBlanc, III
Paul O. Dicharry
ADAMS AND REESE
4500 One Shell Square
New Orleans, LA 70139
(504) 581-3234

Attorneys for Defendant Shell Oil Company

APPROVED AND SO ORDERED:

....

Date UNITED STATES MAGISTRATE

CENTER FOR LAW
In The Public Interest
1575 Eye Street, NW
Suite 650
Washington, D.C. 20005-1105
Telephone (202) 371-0199

Legal Staff

Nancy C. Crisman
Carlyle W. Hall, Jr.*
Bill Lann Lee*
John R. Phillips*
Katherine F. Ransel
Joel R. Reynolds*
Marilyn O. Tesauro*
Fredric D. Woocher*
Nicholas C. Yost

Of Counsel

Robert Blake*
Geoffrey Cowan

Administrative Officer
Marsha H. Kwalwasser

Visiting Fellows

Lawrence A. Goldberg
Jocelyn D. Larkin
Cynthia D Robbins
Ethan P. Schulman

*Admitted In Calif.
Not D.C.

Los Angeles Office

10951 West Pico Boulevard
Third Floor
Los Angeles, California
90064-2166
Telephone: (213) 470-3000

January 20, 1984

W. L. Caughman, Jr.
Manager, Environmental Conservation
Shell Oil Company
P. O. Box 10
Norco, LA 70079

Dear Mr. Caughman:

Section 505(b) of the Clean Water Act ("the Act"), 33 U.S.C. § 1365(b), requires that sixty (60) days prior to the filing of a citizens suit in federal district court under § 505 (a) of the Act, an alleged violator, the Environmental Protection Agency and the State in which the alleged violations occur must be given notice of the alleged violations.

The Sierra Club hereby places you on notice, pursuant to 33 U.S.C. § 1365(b), that a review of your discharge monitoring reports indicates that, Shell Oil Co., Norco Refinery has violated and continues to violate "an effluent standard or limitation" under § 505(a)(1)(A) of the Act, 33 U.S.C. § 1365(a)(1)(A), by failing to comply with NPDES/SPDES ("Section 402") permit number LA000-3522, in the following respects:

Outfall	Date	Permit Limitation	Violation
002	Jan. 1981	Hexavalent Chromium avg. 1.9 lbs/day	7.3 lbs/day
002	Jan. 1980	Hexavalent Chromium max. 4.1 lbs/day	27.4 lbs/day
002	Dec. 1980	Hexavalent Chromium max. 3.7 lbs/day	5.2 lbs/day
002	Feb. 1981	Hexavalent Chromium max. 3.7 lbs/day	4.7 lbs/day
002	Jan. 1983	Hexavalent Chromium max. 3.7 lbs/d	5.0 lbs/d
002	March 1983	Hexavalent Chromium max. 3.7 lbs/d	4.0 lbs/d
002	April 1983	Chromium max. 46 lbs/d	50 lbs/d
002	Nov. 1980	pH max. 9.0 std units	9.8 s.u.
002	May 1981	pH max. 9.0 std units	9.6 s.u.
002	July 1981	pH max. 9.0 std units	11.0 s.u.
002	June 1982	pH max. 9.0 std units	9.7 s.u.
002	June 1981	Phenols avg. 11.0 lbs/d	227.0 lbs/d
002	June 1981	Phenols avg. 22.7/d	1,338 lbs/d
002	Aug. 1980	BOD^5 max. 3,436 lbs/d	3,561 lbs/d
002	July 1981	BOD^5 max 3,436 lbs/d	6,140 lbs/d

Outfall	Date	Permit Limitation	Violation
002	Jan. 1982	BOD^5 max. 3,436 lbs/d	4,930 lbs/d
002	Aug. 1982	BOD^5 max. 3,436 lbs/d	3,690 lbs/d
002	June 1981	COD avg. 13,370 lbs/d	28,600 lbs/d
002	April 1983	COD max. 25,792 lbs/d	36,500 lbs/d
002	April 1980	TSS avg. 1,661 lbs/d	2,240 lbs/d
002	May 1980	TSS avg. 1,519 lbs/d	1,600 lbs/d
002	July 1980	TSS avg. 1,519 lbs/d	1,700 lbs/d
002	Aug. 1980	TSS avg. 1,519 lbs/d	1,880 lbs/d
002	Feb. 1981	TSS avg. 1,519 lbs/d	2,124 lbs/d
002	April 1981	TSS avg. 1,519 lbs/d	1,600 lbs/d
002	May 1981	TSS avg. 1,519 lbs/d	2,100 lbs/d
002	June 1981	TSS avg. 1,519 lbs/d	2,700 lbs/d
002	July 1981	TSS avg. 1,519 lbs/d	1,800 lbs/d
002	March 1980	TSS max. 2,598 lbs/d	4,890 lbs/d
002	April 1980	TSS max. 2,598 lbs/d	6,680 lbs/d
002	May 1980	TSS max. 2,376 lbs/d	4,090 lbs/d
002	July 1980	TSS max. 2,376 lbs/d	2,600 lbs/d
002	Aug. 1980	TSS max. 2,376 lbs/d	3,200 lbs/d
002	Oct. 1980	TSS max. 2,376 lbs/d	2,480 lbs/d
002	Feb. 1981	TSS max. 2,376 lbs/d	8,400 lbs/d
002	May 1981	TSS max. 2,376 lbs/d	3,100 lbs/d
002	June 1981	TSS max. 2,376 lbs/d	6,900 lbs/d
002	July 1981	TSS max. 2,376 lbs/d	6,000 lbs/d
002	Aug. 1982	TSS max. 2,376 lbs/d	2,400 lbs/d
002	Sept. 1982	TSS max. 2,376 lbs/d	3,301 lbs/d
002	Oct. 1982	TSS max. 2,376 lbs/d	3,200 lbs/d
002	Nov. 1982	TSS max. 2,376 lbs/d	2,700 lbs/d
002	Feb. 1983	TSS max. 2,376 lbs/d	3,900 lbs/d
002	April 1983	TSS max. 2,376 lbs/d	6,600 lbs/d
004	April 1982	TOC max. 5 mg/l	6.0 mg/l
004	June 1982	TOC max. 5 mg/l	9.0 mg/l
004	Aug. 1982	TOC max. 5 mg/l	9.0 mg/l

We believe this NOTICE OF INTENT TO SUE sufficiently states the grounds for complaint. If, however, you have any questions or wish to discuss the matter, please contact us.

Sincerely,

/s/ Signature illegible

Nicholas C. Yost
Nancy C. Crisman
Katherine P. Ransel

Center for Law in the
Public Interest
1575 Eye Street, N.W.
Suite 650
Washington, D.C. 20005
(202) 371-0199

Counsel for the Sierra Club

cc: Honorable William D. Ruckelshaus
Dick Wittington
Dale Givens

bcc: Michael Osborne, Esq.
Buck Parker